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LAW GROUP
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Carolyn H. Connelly
Christy K. Monson
Ross M. Williamson*
Diana Moffat
Mark A. Wolf
Rebekah Dohrman, *Of Counsel***
John A. Wolf, *Of Counsel*
*Also Admitted in Washington
**Member of American Institute of Certified Planners

December 14, 2018

Chairman Ajit Pai
Federal Communications Commission
455 12th Street, Southwest
Washington, DC, 20544

Re: City of Independence, Oregon Comments on Second Further Notice of Proposed Rulemaking, MB Docket # 05-311

Dear Chairman Pai:

The City of Independence files these comments to provide the Commission with small, rural cities' perspective on this Proposed Rulemaking and to urge the Commission to reject an interpretation of the Cable Act which contradicts the plain language of the federal statute and jeopardizes freely-negotiated franchise agreements throughout the nation.

The City welcomes cable and telecommunications providers. The City of Independence is a business-friendly municipality dedicated to providing ready-access to our right of way (ROW) on a non-discriminatory basis. It's untrue that rural or small cities somehow slow down or serve as a barrier to expansion of internet infrastructure. Fast internet, reliable cable, VOIP, and video-streaming are crucial lifelines for small or rural cities. No one understands this better than a small city. Telecommunications and cable services allow new opportunities for our rural citizens to build businesses, recruit employees, or work remotely—while still enjoying a small town quality of life. They provide our teachers with unlimited teaching resources and our families with important connections to the wider world.

For these reasons, the City of Independence does not bar entry or in any way hamper the development of cable and telecommunications infrastructure. To the contrary, the City of Independence actively welcomes, encourages, and applauds companies who want to use our ROW to provide these critical services.

The City of Independence telecommunications and cable ordinance complies with the Cable Act, the Telecommunications Act, Oregon laws and the Oregon Constitution. To ensure non-discriminatory treatment of ROW occupants, the City of Independence has adopted a generally-applicable telecommunications and cable ordinance to manage its ROW. This ordinance applies to all telecommunications and cable companies who have facilities in the ROW. (The City also imposes similar franchise fees and rules upon all utilities in the ROW.) The City's ordinances and rules address the mundane but necessary issues regarding the management of our ROW, such as when and how a company can cut into a paved street, how to coordinate construction with other ROW occupants, the establishment of street repair standards, and placement and relocation rules.

Our ordinance also imposes a fair and reasonable fee for any use of the City's ROW. This fee is specifically tailored to comply with the express provisions of:

- The Cable Act (see especially 47 U.S.C. Section 542(b);
- The Telecommunications Act (see especially 47 U.S.C. Section 253(c);
- Oregon state law allowing cities to impose limited ROW charges on telecommunications services (ORS 253.515);
- The City's inherent home rule authority to charge for use of its ROW (Oregon Constitution, Article XI, Section 2 and Article IV, Section 1(5);
- and Oregon case law.

The authorities cited above have not been expressly or impliedly preempted by Congress or by our state legislature.

The City also tried to address the (somewhat unclear) guidance provided over the years by the FCC, which appears to attempt to limit an LFA's authority to charge fees under the Cable Act to the provision of cable services over a cable system. See in particular the January 21, 2015, Commission Filing, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, page 7, stating:

> *"We decline to modify the conclusions in the Second Report and Order regarding mixed-use networks. In the First Report and Order, the Commission concluded that LFAs' jurisdiction applies only to the provision of cable services over cable systems. In the Second Report and Order, the Commission clarified that this conclusion extends to incumbent cable operators as well."* (Underlined emphasis added. See also, First Report and Order, 22 FCC Rcd at 5155-56; 59 Second Report and Order, 22 FCC Rcd at 19640.)

Under the City's ordinance, companies who occupy the City's ROW to provide cable services are charged five percent their *cable services* gross revenues earned within the City, in compliance with the above-cited Cable Act, Oregon law, and the City's

constitutional home rule authority. Companies who occupy the ROW to provide telecommunications services are charged seven percent of their *telecommunications services* gross revenues earned within the City, in compliance with the above-cited Telecommunications Act, Oregon law, and the City's constitutional home rule authority. At no time is a ROW occupant who provides *mixed-use services* charged "duplicative" franchise fees since the fees are calculated based on different services and different authorities. At no time is any mixed-use provider required to negotiate multiple franchise agreements or file extra paperwork.

Under the Telecommunications ordinance, the parties are still required to freely negotiate and enter into a franchise agreement—and the franchise fees charged must comply with federal and state law. The ordinance is also intended to serve as a failsafe approach to ensure the City's authority to collect franchise fees if the ROW occupant flatly refuses to negotiate a franchise agreement or fails notify the City that it occupies the ROW, which are problems that small cities commonly encounter.

The City of Independence did not pass this ordinance lightly. It took great care to address our ROW occupant's needs and suggestions, amended the ordinance to address the majority of concerns raised, and acted in strict compliance with both state and federal law.

The City has reviewed the comments in this docket, including the NCTA's comments. The NCTA's position regarding the authority of our City to assess reasonable franchise fees on all services provided by a cable operator appears to purposefully ignore the Cable Act's plain language. This plain language, found at 47 U.S.C. Section 542(b), clearly authorizes a city to charge a cable operator franchise fees up to 5% of gross revenues "derived . . . from the operation of the cable system <u>*to provide cable services*</u>" (emphasis added). Such authorizing language cannot be reasonably read to serve as a de facto limitation on other rights that a city may have to regulate the ROW.

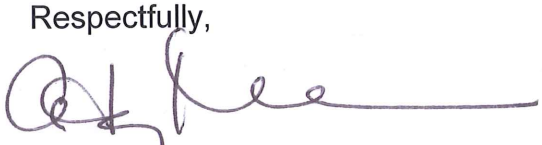
Therefore, it is our belief that the City acted reasonably, fairly, and judiciously in adopting the ordinance and has not abused its franchise fee authority or "overreached" by assessing "duplicative fees." Independence has merely applied existing law to establish a fair and reasonable fee in return for private companies' use of a valuable public asset.

Allowing mixed-use providers to pay only 5% of cable services would create an uneven playing field and would artificially increase cable and internet prices in rural America. To support a level playing field, the City of Independence has taken the position that it will always treat similar service providers in our ROW similarly. This avoids any unintentional discrimination and allows our City to position itself as open for business to *all* types of ROW users. If we were to charge a cable operator who provides mixed-use services only five percent of its cable services, other telecommunications providers in our ROW would be placed at a significant

disadvantage—and those other providers may decide not to extend their much-needed services to our small town. In such a case, small cities would be left with only one or two providers and no meaningful competition to keep prices low and service quality high for our citizens.

The City and its cable providers have negotiated in good faith and the Commission should not retroactively amend negotiated agreements or penalize cities for exercising their statutory and constitutional authority. Independence (along with other cities in Oregon and throughout the nation) has reasonably relied on federal and state statutes, unclear FCC guidance, and state and federal case law when negotiating current franchise agreements. In negotiating these franchise agreements, the City and the ROW occupants each actively bargained in good faith, sometimes capitulating to each other's requests, sometimes trading a priority in return for a needed provision, and sometimes holding firm regarding our respective positions. Despite the fact that small cities are at a distinct disadvantage during such negotiations (due to our limited technological knowledge and limited financial resources to retain telecommunications counsel), Independence strongly asserts that our franchise negotiations were fair and reasonably relied-upon business negotiation. The Commission should not attempt to retroactively negate or amend such negotiated contracts.

Respectfully,



Christy K. Monson,
City Attorney for Independence Oregon,
Commenting on Behalf of the City of Independence